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No. 400

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

LAWRENCE W. GOLDBERG,
Petitioner,

v.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF PHILADELPHIA ELECTRIC COMPANY TO BE ADDED AS A PARTY RESPONDENT

and

BRIEF FOR PHILADELPHIA ELECTRIC COMPANY IN OPPOSITION

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October 1, 1962

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

IN THE

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Lawrence W. Goldberg, Petitioner

v.

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Atomic Energy Commission,
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MOTION OF PHILADELPHIA ELECTRIC COMPANY TO BE ADDED AS A PARTY RESPONDENT

Philadelphia Electric Company hereby respectfully moves this Honorable Court for an order adding movant as a party respondent and amending the caption of this proceeding to show movant as a party respondent.

The petition herein is to review a judgment of the Court of Appeals for the Third Circuit dismissing a petition to review and set aside an order of the Atomic Energy Commission which granted to movant a construction permit for a nuclear power reactor, now under construction.

Movant was a party to the proceedings before the Court of Appeals and therein moved the court, as did respondents named herein, to dismiss the petition for review for lack of jurisdiction, raising the question of the

standing of petitioner to seek judicial review of the order of the Commission in question. Upon said motions the court below dismissed the petition for review for lack of jurisdiction.

Pursuant to Rule 21 of the Rules of this Court counsel for petitioner has notified movant as a respondent of the date of filing of the petition, the docket number of the case and the contents of the record filed, and, pursuant to Rule 33, has served copies of the petition upon movant as an adverse party.

Movant's name has been omitted from the caption of the petition and, as a result, movant may not be acknowledged as a party herein although as the holder of the construction permit and an actively participating party in the proceedings below movant has a vital interest in this proceeding.

Wherefore, for the foregoing reasons, movant respectfully requests that this Honorable Court issue an order correcting and amending the caption of this proceeding to show movant as a party respondent.

Respectfully submitted,

VINCENT P. MCDEVITT,
EUGENE J. BRADLEY,
Attorneys for Philadelphia Electric Company.

October 1, 1962.

BRIEF FOR
PHILADELPHIA ELECTRIC COMPANY
IN OPPOSITION

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QUESTION PRESENTED

Whether an order of the Atomic Energy Commission granting a reactor construction permit is judicially reviewable at the request of one not a party to the proceeding leading to such order who requests such review simply as a member of the public and without having alleged whether or in what manner he is aggrieved by such order.

STATUTES INVOLVED.

The pertinent provisions of the statutes involved are set forth in the petition at pp. 9-10 except that the last sentence of subsection (a) of Section 189 (designated by petitioner as Section 7) of the Atomic Energy Act of 1954 should read as follows:

> "The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under Section 103 or 104b. for a license for a facility, and on any application under Section 104c. for a license for a testing facility."

The above sentence was added by P.L. 85-256, 71 Stat. 576.

STATEMENT.

On July 25, 1960 Philadelphia Electric Company filed with the Atomic Energy Commission an application for a construction permit for a nuclear power reactor. Upon due notice, a hearing on the application was held before a Hearing Examiner of the Commission on December 18, 1961.

Petitioner was present at the hearing and openly elected not to seek intervention as a party under the Commission's Rules of Practice, confining his activities to the reading of a statement. His statement made no reference to the safety of the reactor, to its location, to his remoteness from or proximity to it, or to any physical or economic injury to him which might result from its construction or operation. On the contrary, his statement was limited solely to comments on policy matters of a politico-economic nature relating to phases of the government's atomic energy program, with vague references to constitutionality (Transcript).

Some nine weeks after the close of the hearing, after the issuance of the initial decision authorizing the permit,

petitioner directed a telegraphic request to the Commission for leave to intervene as a party. Again, petitioner did not assert any threatened injury to him, economic or otherwise, from the construction or operation of the reactor, or assert that his interest would be affected by the proceeding (Exh. E). By order issued March 1, 1962, the Commission refused the request on the grounds that it was not timely, that it offered no explanation of petitioner's delay in seeking intervention, that it was made without notice to the parties and that it referred to petitioner only as a member of the public without any showing of such interest as would give him standing to intervene (Exh. F).

On April 27, 1962 petitioner filed with the United States Court of Appeals for the Third Circuit a petition to review the final order of the Commission directing the issuance of the construction permit, said order having become final on March 5, 1962. Again, the petition for review was utterly devoid of any claim, or any allegation to support a claim, that petitioner was or would be adversely affected or aggrieved, as a citizen, a taxpayer, or otherwise, by the order sought to be reviewed (Petition for Review).

Upon motion Philadelphia Electric Company was granted leave to appear as a party in the case. The Commission and Philadelphia Electric Company filed motions to dismiss the petition for review for the reason that petitioner was without standing to seek review. After hearing, the Court, on June 5, 1962 dismissed the petition for lack of jurisdiction[1] (Petition, p. 12).

[1] Petitioner also filed in the court below a motion to stay the construction permit and "all proceedings herein" pending determination of the petition for review. This motion was likewise utterly devoid of any showing as to how petitioner was aggrieved by the order sought to be reviewed, made no allegations of injury to the petitioner in the event a stay was denied, nor any other allegations to support the motion (Motion to Stay). The court, after hearing, denied the motion on May 8, 1962 (Petition, p. 11).

ARGUMENT.

I.

THE DECISION BELOW IS CORRECT.

Section 189 of the Atomic Energy Act of 1954, 68 Stat. 955, 42 U.S.C. § 2239, makes final orders of the Commission in proceedings for the granting of construction permits judicially reviewable in the manner prescribed by the Judicial Review Act, 64 Stat. 1129, 5 U.S.C. 1031 *et seq.* and subject also to Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009.

Section 4 of the Judicial Review Act provides for review of such orders at the instance of "any party aggrieved" (5 U.S.C. § 1034) and Section 10 of the Administrative Procedure Act provides for judicial review of agency action at the instance of any person "suffering legal wrong", or "adversely affected", or "aggrieved" by such action (5 U.S.C. § 1009).

The naked assertion, in a petition for judicial review of an agency order, that the petitioner is aggrieved by the order, without factual allegations to support such an assertion, is insufficient to confer standing to seek judicial review. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 219 F. 2d 729 (3d Cir. 1955), *cert. denied*, 349 U.S. 945. Petitioner having failed to assert that he was adversely affected or aggrieved by the order sought to be reviewed and having failed to make any factual allegations which would support a claim of aggrievement, the court below properly dismissed his petition for review.[2]

[2] *Some four weeks after the statutory period for filing a petition for review had expired*, petitioner's counsel, during the course of his oral argument in the court below on motions to dismiss the petition for review for lack of jurisdiction, *for the first time asserted hazard to the health and safety of petitioner as a basis for his standing to seek review*, no attempt being made to amend the petition for review to incorporate therein such unsupported arguments of counsel.

Absent any allegations to show that petitioner is aggrieved by the order in question, the petition for review was merely that of a member of the general public without such interest as is necessary to invoke judicial review. It is insufficient that his only interest in the matter is a desire that the laws be properly administered. *Railway Express Agency* v. *Kennedy*, 189 F. 2d 801, (7th Cir. 1951) *cert. denied* 342 U.S. 830.

II.

THERE IS NO CONFLICT OF DECISION.

Petitioner asserts a conflict between the decision of the court below and those of other federal courts of appeals and of this Honorable Court. The assertion is erroneous. In each case upon which petitioner relies standing to seek judicial review of agency action was predicated upon some specific and direct adverse effect of such action upon those seeking review: in *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943), order vacated, 320 U.S. 707, financial loss to the purchasers of millions of tons of coal resulting from an order increasing the minimum price of coal purchased in their area; in *Reade* v. *Ewing*, 205 F. 2d 630 (2d Cir. 1953), adverse effect upon the health of a consumer of oleomargarine from an order allowing an allegedly unwholesome substance to be added to it; in *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, economic loss to the licensee of an existing radio station from an order authorizing a competitive station. And in *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *United States*, 108 App. D.C. 97, 280 F. 2d 645, reversed on other grounds, 367 U.S. 396, labor unions and members thereof who had intervened in a Commission construction permit proceeding *claiming that the operation of the reactor threatened them with specified economic and other injury* were held to have been aggrieved by the issuance of a permit to construct

the reactor, and thus to have standing to seek judicial review. In the instant case the record is devoid of any allegations by petitioner of a comparable nature which would render him adversely affected or aggrieved by the order sought to be reviewed.

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The petition for review being devoid of any allegations that petitioner was aggrieved by the order sought to be reviewed, the question presented herein by petitioner (Petition, p. 2) does not arise in the record. The rule that a person who has not shown whether or in what manner he is adversely affected by an agency order lacks standing to seek judicial review thereof being well settled, there is no important question of federal law present herein.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

VINCENT P. MCDEVITT,
EUGENE J. BRADLEY,
Attorneys for Philadelphia Electric Company.

October 1, 1962.